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A CASEBOOK ON LEGAL HISTORY*

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The subject assigned for discussion in this conference assumes the *desirability* of a casebook on legal history, and calls specifically for discussion of its province and its arrangement only. It seems evident, however, that underlying all other questions is this: what is to be the purpose of the course for which the suggested casebook is to be compiled? Purpose must necessarily determine in a general way the province, alike as to time and subject matter; and purpose and province must together control the choice of detailed content and the arrangement thereof. It is therefore manifestly impossible to discuss these topics individually; accordingly I shall consider together, and in a general way, all of them—purpose, desirability, province in time and content, and arrangement.¹

Legal history may be introduced into the curriculum—and in fact has been introduced by various schools, members of this Association—in different years, in varying manner, and for diverse purposes. Aside from set courses in legal history, it is not to be forgotten that scores of the fundamental concepts of the law are historically developed through cases in the various technical courses of the curriculum; nor should it be overlooked that in various schools a considerable amount of genuine training in research is given by instructors in supervision of student notes prepared for law reviews. Of set courses, either exclusively devoted to legal history or (as indicated by the catalogue descriptions) avowedly based to a greater or less extent upon historical exposition, it

* A paper read in the conference on Jurisprudence and Legal History during the recent meeting (Dec. 29-31) of the Association of American Law Schools. A few slight omissions and additions have been made in the interest of clarity.

¹ The Chairman of the Conference, Professor George E. Woodbine, requested consideration, by those who were to read papers in the Conference, of the following questions, to most of which answers are given, either explicitly or by implication, in the present paper. First, with respect to the proper province of a casebook:—at what date it should begin, and how far come down; whether it should cover all the older law or merely the origin and development of what have become fundamental ideas and relations in our law; be confined to common law, or also deal with equity, and with the old ecclesiastical jurisdiction; and whether by its aid we may be enabled to dispense with historical introductions to our technical courses. Second, with respect to method of compilation:—whether it should be arranged chronologically or topically; whether one might start at a middle point and work both backward and forward; whether the book should deal with topics individually and as wholes, or with various topics at the same time; give, preferably, a cross-section of time or of law; contain cases only, or both cases and extracts from the early writers,—and if from both, whether there is any general principle that should govern the amount of each to be incorporated.

appears that the following are either now offered, or have within recent years been offered, in schools of this Association: so-called introductory courses ("introductory law," "elementary jurisprudence," etc.), in 3 schools; courses on the general history (or "history and system" or "fundamental institutions") of the common law, in 13 schools; on the primitive Germanic or medieval English basis of our law, in 3 schools; on special fields or topics of the law (history of property, of contract, of modern procedure, of attain, etc.), in 5 schools; on the origins and development of the local state law, in 3 schools; required reading-courses, for students of one or more years, in 3 schools; and courses in research, in 2 schools—not counting one course on "research" that is apparently conducted by lectures only! Twenty schools of our Association have participated in these experiments. In divers combinations the following books appear as the basis (when specifically indicated) of the courses just indicated: the histories of Jenks, of Maitland & Montague, of Holdsworth; Blackstone's "Commentaries"; Holmes's "Common Law"; Pollock's "First Book of Jurisprudence"; Maitland's "Forms of Action"; Maine's "Ancient Law"; Pound's "Readings on the History and System of the Common Law"; Street's "Legal Liability"; this Association's series on "Evolution of Law" and its "Select Essays on Anglo-American Law"; various of the Yorke Prize Essays; Campbell's "Lives"; Lewis's "Lives"; Warren's "American Bar"; Baldwin's "American Judiciary." In optional reading courses, for which credit is given, in the field of history, various other books are included. Courses in legal bibliography are ignored, inasmuch as most of these courses probably deal solely with the lawyer's practical modern tools, although these courses in at least two schools are more historical and scholarly.

I cannot, of course, indicate the purposes for which these several courses are, in fact, offered. I can only state what, in my opinion, *should* be those purposes; and then, with reference to ends thus dogmatically postulated, express my further opinions respecting the desirability of a casebook as a means for realizing those ends. This I shall proceed to do.

We may evidently in this connection leave out of account all courses in research. The opportunities are immense, and our hopes are high, with respect to that portion of the curriculum; but for the student really qualified to do research work the only possible casebook is the whole body of the printed law. Personally, I would also lay aside at once all thoughts of casebooks so comprehensive in scope that they would encroach, to any considerable extent, upon the case material which, in the several technical courses, presents in the slowly unfolding detail of decisions the shaping of particular doctrines.² In their study the

² Such topics might, however, evidently be used with excellent results. Professor Nathan Isaacs, who opened the discussion of this paper, advocated the use of

student will daily find the light of history on his path, and in their study he *should* also learn the elementals of research. But if we should attempt, for the purposes of a special course in legal history, to take over the history of all subjects, or even of their leading concepts, our undertaking would be wrecked upon ambition.

My attention is accordingly confined to introductory courses and to a generalized historical course for more advanced students.

First, then, as regards an introductory course. Many schools manifestly regard such a course as desirable. Should we compile for such a course a casebook? In my opinion the tyro should not, in such a course, be plunged into cases. For one reason, because he gets enough of these in his other courses; for another, because the great majority of leading cases are, *as regards their historical significance*, quite beyond a tyro's comprehension—at all events to any degree that would be fruitful; and for another reason, because cases will not yield, except when studied in enormous bulk, the material which seems (to me) most desirable—this last reason being dependent upon the purposes that I postulate for the course in question, which purposes will be stated in a moment. When I say that it seems impracticable (either in an introductory course or, for different reasons, in any general course) to teach legal history primarily by "cases," I mean of course by *decisions*. It is easy to find *opinions* containing disquisitions on history; but unless an historical assertion is essential to the decision one learns no history from the case—strictly. The disquisitions are only textbook matter in judicial opinions, and may or may not be well considered. Such, for example, are Chief Justice Cockburn's history of prescription, in *Angus v. Dalton*,³ Lord Justice Fry's history of delivery in the law of gifts, in *Cochrane v. Moore*,⁴ Lord Hardwicke's history of gifts *causa mortis*, in *Ward v. Turner*,⁵ and the history of the bailee's right to recover full value and of his liability to account to the bailor, given by Collins, M.R., in the case of *The Winkfield*.⁶ To take another example, there is no difference between historical statements made by Lord Blackburn in his

selected topics of this kind, in addition to others not directly covered in any of the technical courses. He suggested a casebook consisting of three main parts, as follows. First, a "general part," designed to show the larger features of the external history of our law, give information regarding our great legal writers and classics, and emphasize the lawyer's actual use of history. Second, a "particular part," in which should be developed the history of various selected principles or subjects; such as the doctrine of consideration, the property rights of married women, and the relation between law and morality. Third, a list of problems that could be assigned to students for research. Professor Isaacs would utilize case material so far as possible; and though the present writer would do the same, it is probable that Professor Isaacs would be more reluctant to recognize other materials as equally good or better in a given case.

³ (1877) L. R. 3 Q. B. Div. 85, 103.

⁴ (1890, C. A.) L. R. 25 Q. B. Div. 57, 64.

⁵ (1752, Ch.) 2 Ves. Sen. 431, 439.

⁶ [1902, C. A.] P. 42, 58.

textbook on sales and similar statements made by way of dictum in his opinions. However great might be the interest and value of a collection of opinions reprinted for the sake of historical dicta, such a collection is not one from which a student will learn legal history from cases. He may, however, learn therefrom that judges find it necessary, or desirable, to study history; and he may or may not acquire therefrom sound historical information. But suppose that a case really does embody a point of history: take e. g. *Thurston v. Blanchard*⁷ which shows the extension of trover to cover the situation where the defendant admittedly secured title, but by fraud. In one of our excellent casebooks on personal property that case appears, as regards that point, alone. Can any student learn from that one case its historical significance? Evidently he cannot. He must learn that either through textbook commentary (printed, or the oral comment of the instructor) or through the study of many decisions in the field of trover. There cannot be many cases in which history—history in a broader form than the history of minute points of doctrine—is to be learned from decisions; and of such cases, printed alone, no student could learn the significance independently of extraneous comment. On the other hand, of course, history—and history in a fairly broad sense—*can* be learned from long series of decisions; but we cannot have a casebook of a hundred volumes by which to teach legal history in this manner.

Whether or not a reading book should be compiled of materials primarily other than cases in the strict sense—giving, of course, all justifiable prominence, under this head, to judicial digressions into the field of history—seems to be substantially a question of convenience. An examination of the material actually used in such courses shows that cases are in general not utilized, and that the range of other materials utilized is exceedingly great. In some schools members of the faculty lecture, combining history with analysis and exposition, upon the law's sources, its chief divisions, the judicial system, decisions and reports, the doctrine of precedents, etc. In another school an instructor seeks to open the minds of beginners by requiring them to read Justice Holmes's essays on *The Path of the Law*⁸ and *Law in Science and Science in Law*.⁹ And so on. I can only say that I would not accept as complete and ideal, for my own use, any selection adopted in any school thus far. I should add matter from various books not included in the list noted above; and I suspect that various of my auditors would do the same. In short, reading matter, admirable for novices, is abundant, and instructors may freely choose and assign. In view of the diversity of choice by them expressed, it would seem of questionable expediency to compile a set selection of readings.

⁷ (1839, Mass.) 22 Pick. 18.

⁸ (1897) 10 HARV. L. REV. 457; *Collected Legal Papers* (1920) 167.

⁹ (1899) 12 HARV. L. REV. 443; *Collected Legal Papers* (1920) 210.

It is quite possible, however, that a selection could be made so catholic as to suit everybody. I will only state what I would postulate as the purpose of such a course, and thereby indicate what must be in any reading book compiled, if it were to suit me. This egoism is imposed by circumstances, as already explained, and may therefore, I trust, be pardoned.

In my opinion the objectives of an introductory course should primarily be these: to stimulate the beginner's curiosity respecting the law's past; to teach him the nature of judicial law, indicate the growing bulk of reports and of statutes and the relative scope of our enacted and unenacted law, and suggest to him the respective merits and demerits of judicial decisions and of legislation as agencies of legal growth; to teach him, of course, that there is history in the law—though that fact he will be learning day by day in his technical courses,—but also, above and beyond that, to suggest to him the broader social implications of the law's history; to *start* him with the idea that in entering upon the study of the private law he begins the study of a social product and instrument, most of whose rules, even in detail, have been as truly evoked by human experience and adopted to advance human purposes as have been railroads, sewers, the weather service, or the 18th Amendment; and thus to leave him at least vaguely conscious of the law's social origins and its social reactions. With that accomplished, he could well be left to garner in his technical courses illustrations of the tortuous processes of legal development as regards doctrinal details; and to note in those courses either confirmations or contradictions of the general ideas to which his mind would, in this introductory historical course, have been exposed. But inasmuch as I postulate similar purposes for the generalized course that I would offer to advanced students, with only a difference in the intensity of exposure, I will delay for a few moments to answer certain objections to the above suggestions which, I am sure, have been formulated by various of my auditors as I have read.

We may now pass to the question of more advanced historical courses. Two casebooks would here be required to meet my ideal; but, as I imagine them, they would by no means be adapted to any and every sort of a course in legal history. In particular, they would not serve as the basis for a wholly general course, designed to deal with the law in all its aspects and at all stages of its development. The object of such a course must be, I should suppose, primarily informational—that is, the acquisition of information without reference to any *generalized principle or lesson*. I, for one, should be inclined to restrict this informational purpose to reading courses; but we are not now concerned with that question. At all events it would seem very probable that no casebook could be devised that would adequately serve the needs of auxiliary reading in such a general course. Evidently we could not put into a casebook the materials upon which Dr. Holdsworth will base the seven

or more volumes of his definitive edition. In my opinion we could not even put into it a satisfactory sampling of his sources.

On the other hand we undoubtedly could do something in the way of a general casebook if we confined ourselves to some limited period of time; but such a collection of materials would seem to be best adapted to specialized courses, which I am not here considering, or to research training; and that also—for reasons already indicated—I leave out of account. Cross-section samplings, general in character, might indeed serve very well, by their contrasts, the purposes already indicated as the basis of the sort of casebook that I advocate; but this is by no means certain. In particular, their effect would probably be weakened in proportion to the generality or scope of their content; that is, cross-sections of a single department of the law at different times, in a casebook for a specialized course, would probably be more effective than cross-sections covering more vaguely all departments in a casebook attempting to deal with the whole law. In general, a casebook confined either to one limited period or to several distinct periods seems to me, therefore, undesirable. And in particular a collection confined to our old law would clearly be unsatisfactory as an instrument for realizing the specific purposes that I have postulated; for it would leave a gap between the old law and the present law of our technical courses—yet it is precisely across that gap that we should carry the student, for it is that gap that must be made *significant* to him. In my opinion emphasis should be put upon the modern law, carrying it as to every topic down to and this side of Stimson's record of our legislation; and the old should be only utilized, either to explain and justify the present law or to show the inhibitory influence therein of antiquated rules that still persist, giving as full a record as possible of all past criticism and agitation for reform.

Of the two casebooks that seem desirable for advanced students one would be devoted to the rationale of our law; of *our* law, although by no means excluding purely theoretical and comparative discussions of jurisprudential concepts. The emphasis in this volume would be upon analysis. It would be a collection of cases and discussions bearing upon the origin, history, present scope and inter-relations of the divisions and concepts of our law. Although Dean Pound deliberately subordinated the consideration of "system" in his *Readings on the History and System of the Common Law*,¹⁰ his book is nevertheless rather one of the type here indicated than of the other type that I have in mind. But I pass by the questions suggested by his compilation, inasmuch as we are to-day not concerned, primarily, with the framework of our law but with its history.

To the latter I would devote my second casebook. This would aim at a presentation of the general ends and aetiology of law, as illustrated

¹⁰ (2d ed. 1913).

by a portion of our law; but the purpose of the book would be to develop *historical mindedness*—not, *primarily, to impart historical information*. Now, there are two topics that would seem to lend themselves peculiarly well to this purpose; and consequently I would devote to these topics two sections of my casebook. That their history would also, in all probability, convey more historical information with regard to our law in general than would any other two topics is very fortunate, though not the basis of my choice. These topics are the history of property law and the history of remedies. I will refer to each of them.

The law of property is admittedly that department of our law in which the past bulks largest in the rules of the present, and in which our fear of disturbing basic social interests has resulted in the greatest obstacles to betterment. It is therefore the subject that best lends itself to the inculcation of the truths that I would wish to have imparted. I would compile this section of the book in the following manner. The framework is adopted because imposed by the historical content, but the matter included would of course show the worthlessness of some of the scaffolding and the weakened nature of other portions.

1. Things, and things corporeal and incorporeal; with illustrations, old and modern. And here I would go sufficiently afield, into medieval Germanic law and the modern German code, to make plain the significance, as respects the general basis of our law of property, of our continued adherence to the medieval inclusion of incorporeal things under the general concept.¹¹

2. Some discussion of the broader divisions of our law—of persons, of obligations, of property; definitions of "property," including the

¹¹ It is impossible, at this time, to expand the condensed suggestions here made regarding the specific contents of the casebook, and I will only repeat here one explanation that was made orally in the conference. The medieval Germanic law, equally in England [2 Pollock & Maitland, *History of English Law* (2d ed. 1899) 124-149] and on the continent of Europe [see Hübner, *Germanic Law* (Philbrick's transl. 1918) 160-69, 203] was full of incorporeal things, especially of incorporeal hereditaments of which seisin was posited. Our own law is still full of incorporeal things; but the meaning of "thing," in the "law of things" of the present German code, is ostensibly restricted to corporeal or physical things. But see Schuster, *German Civil Law* (1907) 58-60. Now consider a contract. When contractual rights became alienable they took on one practical aspect of what we call "property"; and to the extent that the contract relationship has come to be protected, as an independent *res*, against interference by strangers to the obligation, it has acquired another aspect of property. When these features of the contract are in mind it is the most natural thing in the world for us to think of it as "property." But evidently, though the "law of things" of the German code corresponds in general to our law of "property," the developments just mentioned could not, under that code, be envisaged and dealt with as they can be under our law. The adherence on our part to, and departure on their part from, the medieval concept of a "thing" inevitably entails important changes of theory and of practical solution. Compare also our discussions of the nature of the interest of the *cestui que trust*.

practical test of exchange value and Austin's triple test of duration of interest, privileges of enjoyment, and powers of alienation. Here I would include, also, material on the actual history in our language of the words "estate," "property," "owner" and "ownership," and "title." Also various illustrations of the way in which the question arises (in bankruptcy, probate proceedings, etc.) whether "something" is "property."

3. The distinction between realty and personalty; its origin; the difference between this distinction—almost peculiar to our law—and that between movables and immovables—which is practically universal; the practical tests upon which the distinction has been dependent at different periods in our legal history; conversion by wills and contracts; the extent to which demand has been made for the abolishment of the distinction, and to which such demand has been realized; modern statutes; illustrations of the importance of this distinction to-day.

4. Seisin and disseisin—with some resort, here also, to non-English materials; relation of seisin to tenure and to estates, of present and of expectant enjoyment, and to the alienation thereof; relation of seisin to "title"; general history of disseisin, adverse possession, and prescription.

5. Comparison of medieval remedial systems for the protection of land and chattels; questions, in regard to chattels, of the interests of bailee, thief, and trespasser (Ames and Bordwell essays); later history of the hierarchy of land remedies, and their illustration in the law of adverse possession.

6. Chattels personal; medieval forms; increasing variety and economic importance in modern times; the same as to incorporeal personalty; choses in action, expanding content, definitions attempted, continued doubt as to the proper meaning of the term; generalities on future interests in personalty.

7. Hereditaments, corporeal and incorporeal; importance of the latter in medieval theory and commerce; common-law canons of descent, with history of American changes, oddities in present statutes; local customs of descent, variants from the common law; with a little here about senior-right and junior-right in various primitive legal systems—enough to make clear the social meaning of all such rules—and about the social reaction of the dominant English form.

8. Taking up, now, the elements of Austin's triple test—first: Estates; uniqueness of this conception of our law; manifold logical applications, also peculiar to our law, to which it leads in the field of future interests; classification of estates; history of individual estates, with special reference to lease-holds (now called "estates"), entails, and future interests in land and chattels; distinction between legal and equitable interests of various kinds; oddities (from the viewpoint of the old law) in the terminology of the latter.

9. Enjoyment, otherwise than by way of alienation; a little here of the Hohfeld nomenclature, also of the police power; waste, and rights of reversioners; "natural rights" in land, and nuisances interfering therewith; motive torts in the use of property; rights in *alieno solo*; various modes in which one may control his neighbor in the latter's use of his own land—with enough regarding general restrictions upon, and technical prerequisites to, the creation, and regarding the informal destruction, of easements and rights of entry for condition broken to illustrate the factor of public policy; differences between England and the United States as regards covenants running with the land at law and in equity—public policy again; meaning of the phrases "for the benefit of" and "touching and concerning," in the law of easements and covenants; control of other persons, owners of personality, in their use of the same. Here also I should be inclined to put the history of liens, rents and rent charges, pledges and mortgages.

10. Alienation of interests, legal and equitable; history of wills; of alienation *inter vivos* at common law and under the statute of uses; oddities in the alienation of equitable interests; history of the alienability of "mere expectancies and possibilities" and of choses in action.

11. Public interests and policy; publicital element in livery of seisin and in modern recording systems; material on, or possibly mere cross references to, topics already covered—the struggle for a strict settlement in tail, the police power, rights in *alieno solo*, restraints on alienation, rule against perpetuities—which have revealed the factor of public policy; public rights, also franchises; eminent domain; game laws, history of treasure-trove, gold and silver mines; inheritance taxes; underlying social basis of all "title," original and derivative, to property.

12. Reforms, accomplished and agitated, in the law of property. Here might come some cross-section summaries of the law at different periods. Careful attention to legislation would be given in every part of the casebook.

As respects the second section of the compilation, that on legal remedies, in the broadest sense, I will indicate more briefly my ideas. My main reason for this is that I have never taught any of the remedial courses and have only glimpsed the problems that they present. It seems evident, however, that two things are true: one, that the struggle to stretch legal remedies to cover new wrongs—to change these from moral into legal wrongs—is eternal; the other, that the effects of such a struggle, of some five hundred years ago, is still discernible in the classifications of our law. It seems to me that a casebook of immense suggestiveness could be built up around these two ideas. No doubt very much of the material is immediately available in casebooks made or making. The old forms of action, and their later history; the everlasting problem of the relation between remedy and substantive right; the general development of remedies in different parts of the judicial

system, including here the ecclesiastical jurisdiction along with that of equity and the courts of common law; the history of procedural reform; the present relations between equity and common law;—these are some of the topics that I should like to have treated by someone competent to do so.

I will endeavor to make more intelligible these very general remarks by elaborating, somewhat, the topic last mentioned. I should like to introduce subsections such as the following: circumstances that imposed upon equity the abnegative principle that equity acts *in personam*, only; the true formula of equitable jurisdiction—whether the principle just stated (admitting that this may be the key to the mere procedure of equity), or (as Mr. Billson contended) the principle that equity acts upon a higher morality than law, is the truer key to equity's actual development; the growth of equitable procedure *in rem*; what equity acts to protect—modern extension of its remedies beyond the field of property, with material, also, on such matters as Lord Selborne's suggested distinction, in the law of nuisances, between injuries to property and interference with the mere enjoyment of life; the question of the actual relative jurisdiction of law and equity to-day—the actual effect upon equitable jurisdiction of the liberalization of the law of damages and of the growth of quasi-contract; the problem of the fusion of law and equity—their ancient relations, and so-called "equitable" remedies of assumpsit, trover, and case; the penetration of equitable principles, in the strict or in a looser sense,—as to forfeiture, implied conditions, stoppage *in transitu*, election, indemnity, contribution, exoneration, subrogation, equitable defences to legal actions, the provision of the English Judicature Act, etc.—into the law, including quasi-contract; the apparent decadence of equitable remedies in the hands of courts applying both systems; the question as to whether the two systems "conflict"; and the general present possibilities of promoting fusion and the predominance of equity.

This will sufficiently illustrate my ideas.

Into both of these collections (as into the reading book for less advanced students, were such to be compiled) I would introduce with great liberality selections other than decisions. As regards property, Professor Kirchwey did this long ago in his *Readings*,¹² though my preference would be for very different materials, to serve a different purpose. Leake's essay before the Juridical Society on the *Theory of the Law of Property*,¹³ Vinogradoff's brief contribution to the *History of the English Classification of the different Kinds of Property*,¹⁴ the papers by Elphinstone, Sweet, and Williams¹⁵ on the definition of choses in

¹² *Readings in The Law of Real Property* (1900).

¹³ *Papers Read before the Juridical Society: 1855-1858*, 531.

¹⁴ *Festschrift: Heinrich Brunner—Dargebracht* (Weimar, 1910) 573.

¹⁵ In volumes 9-11 of *The Law Quarterly Review*.

action—such are the materials, to instance a few topics at random, upon which one might levy.

It is my contention that no student could go through such a book as I have here imagined and *escape* liberalization. He would see the social underpinning of ancient rules, and see those rules repealed, when that basis had disappeared, by modern legislation; or would see the rules endure, with no present props except prejudice or inertia. He could not possibly escape the conviction that "Blackstone and Kent"—substituting negatives for Surrogate Fowler's affirmatives¹⁶—did *not* "to all intents and purposes furnish a science of law," and that Blackstone did *not* give us (nor has anybody yet given us) "an accurate legal terminology in the vernacular." He would see at various points and in various aspects the relation between personal security, business and other social interests, and public policy on the one hand and law on the other hand; and a true conception of the law would inevitably become vital in his mind. He might, indeed, leave the law school believing that the law is "the noblest product of the human mind" (as one of my own instructors called it), but certainly he would not imagine even it to be a perfect instrument exactly adjusted to ideals. It is not to be forgotten that in all his technical courses there will be a daily counter-influence to anything which conservatives might fear in the above program. His other casebooks he would use more reflectively, but there is no danger whatever that he would ever come (even while in the law school) to look upon cases as only, to use the phrase of Justice Holmes, "the small change of legal thought." He will never look upon them as *small* change, but he must be *made* to realize that they are only "change," only token currency; that is, indicators of social interests that are the real values involved.

Of course many topics other than the two suggested by me could be effectively used for the same purpose. The relation between law and social interests could be illustrated by the legal status of telegraph and telephone and the uniform state legislation in the field of commercial law secured in recent years; the inter-action of conflicting interests could be illustrated by the law of master and servant; the growing refinement of law could be shown with reference to the mental element in crime, tort, estoppel, reformation; and so on. But it is believed that on the whole the two topics that I have chosen combine the maximum of merits.

I have remarked above that certain criticisms have doubtless, as I have read, been formulated in the minds of my auditors. Though at the cost of repetition I wish to refer to three of these—real or imagined—objections.

First, I deny unqualifiedly that the student learns from the technical courses these things that I wish him to learn. It was once frequently

¹⁶ Fowler, *The New Philosophies of Law* (1914) 27 HARV. L. REV. 718, 721-722.

said that students, in some mysterious way, gained from those courses "jurisprudence," or at least the system of our own law; but, assuming that every department of our law may embody, as Pollock said of possession, "a fairly consistent body of principles," it is apparently generally admitted to-day that law students do not perform such tasks as did Sir Frederick Pollock, and that, as regards general jurisprudence, they could not derive *that* from cases and (until our recent education) instructors innocent thereof. Similarly as regards the historical notions above adverted to, be they desirable or undesirable. The great majority of students seem to me very scantily interested in the rich historical information in their casebooks, and resistant even to its superficial impressions. I have known students of equity, for example, despite a constant iteration in that course upon historical influences and changes, and after reading opinion after opinion, all dated, by Lord Eldon, to be quite ignorant of the date of his activity; and have generally found that third-year students will stumble up and down the centuries in attempting to locate Bracton, Coke, Littleton, Blackstone, Mansfield, Bentham, Jessel, and other legal luminaries of like magnitude. This is, indeed, not quite so disheartening as would be the inability of a graduate student of English poetry (taking a doctorate in literature) to give the centuries of Chaucer, Spenser, Shakespeare, Dryden, Byron, Shelley, and Browning—since in law we emphasize principles and submerge personalities; but at the best it reveals an impressive lack of intellectual curiosity. What is more important, the technical courses do not seem to develop *historical mindedness*: such history as students perforce take note of is noted only as something obsolete, to be forgotten; the broader lesson is unseen. And finally, while we must all agree that students *ought*, under the case method, to pass in consciousness, as Professor Powell once remarked¹⁷ that they do, "beyond the form and the expression of law to some segment of the substance of life with which law deals," it is my humble opinion that in actual fact they do not so pass. We all know how difficult it is to induce students so to visualize the stories in their casebooks as to present them, in their abstracts, simply and directly, and as a human dispute: it is the rare student who perceives even the surface of life—who evidently *feels* the humanity—in his casebooks. As for the suggestion that students in general see the legal system through myriad details, and draw from their technical cases the deeper lessons of the law's history, I, for one, can only dissent. And yet—

Secondly: it cannot, I think, be denied that the purposes above stated are fundamental prerequisites to real progress in the study and eventual betterment of the law. Inattention to them has been for forty years the gravamen of Justice Holmes's criticisms of the bench, bar, and law schools of this country; their transcendent importance, the burden of

¹⁷ Address on *Law as a Cultural Study* before The American Bar Association. *Proceedings* (1917) 573.

his exhortations to us. In this respect he has been the leader, far ahead of all followers, in this country.¹⁸ His salience alike as judge and legal writer will ultimately rest primarily upon these ideas: as judge because in his constitutional opinions he has frankly and constantly insisted that law is made, and rightly made, by dominant opinion; and, in other fields of the law, because alike as judge and writer he has forever and in varied ways repeated that social needs and opinions are the procrustean bed to which the law is bound and forced to conform; every legal rule representing a choice, and every consequent judicial decision an affirmation of such choice, "between competing social interests." Yet these ideas have not penetrated widely in the profession outside of the law schools. They are realities to economists, sociologists, social welfare workers, and students of government, but they are mere empty generalities to most lawyers; and if they remain so the law will be "reformed," not by lawyers, but by laymen who are its bitter, and in the main its unjustified, critics. We must—in some way, in all ways—train students to take no casebook (no matter what the dates of its materials) on a chronological level. We must make them realize, vitally and impellently realize, that just because the law embodies "beliefs that have triumphed," its rules can only be more or less impermanent conventions; and that because these, in their reaction, tend to tie society to the *credenda* of its past, they become, as its persuasions nevertheless and necessarily change, constraints upon its growth. Simple ideas, certainly; and as respects the public law there can hardly be even an illiterate in the country so ignorant as not to know that we have adopted the popular election of United States senators, woman suffrage, prohibition, and the income tax not only in response to public opinion but with the resolution to purify our lives or better the world through the constraint and reaction of law. And yet, in regard to the private law, these ideas—though seemingly so trite that one feels apologetic before the present audience for even mentioning them,—far from animating the consciousness of lawyers and motivating their relations to their profession and to society, are evidently ignored by them; wherefore the anomalous antiquities in legal rules, and the call upon us (by one of our own committees at this meeting of our Association) to reform. Now it is idle to talk of effectively reforming the law, and still idler to talk of effectively reforming its administration, until we have prepared for reform in the consciousness of the profession; and the way for law schools to reform lawyers is to enlighten and reform students. In my opinion such a casebook on legal history as I have suggested would materially aid us in this task.

Thirdly, and finally, I fear that to some of my hearers what I have said of purposes will appear—if not, after my appeal to Justice Holmes,

¹⁸ See the present writer's review of his *Collected Legal Papers* in *THE FREEMAN*, June 29, 1921, at p. 378.

graceless *per se*—at least too direct and shameless; too much like propaganda in the odious sense which that word has recently borne. Devotees of the Socratic method may say that the casebook suggested would do violence to the student's mind and conscience. Nothing is farther from my desires. My idea is that it does, perhaps, do violence to a student's mind to teach him, for example, that contingent remainders, though legal property interests since about 1430, are still in various states almost without property content, being inalienable by the holder and destructible by others; but that the violence is lessened if we show him how and why legislation has elsewhere given to such interests full protection. I do not propose, however, that the student be told, by way of mere *ipse dixits*, even from the mighty like Justice Holmes, that either all the law or part of the law is out of joint. Any such assertions included would, indeed, be from worthies of the profession: Bentham, Brougham, Holmes, Joshua Williams, the Parliamentary Commissioners, and the like. But even such assertions would be amply controlled by the supporting data and by the other courses of the curriculum. I do not suggest dogmatism and preachment. I merely suggest that we do—with somewhat different material, on a larger scale, with single purpose and concentrated effort—what we already do insequently, and with more or less scattering aim, in the technical courses: offer all the facts, and among these the historical data, for judgment. I merely propose to present the law's greatest single lesson so directly, so concretely, so massively, that no intelligence can miss it.